



STATE OF NEW JERSEY

**DECISION OF THE
CIVIL SERVICE COMMISSION**

In the Matters of S.C. and E.B.,
County Correctional Police Sergeant
(PC2077U), Essex County

Bypass Appeals

CSC Docket Nos. 2021-270 and
2021-271

ISSUED: MARCH 26, 2021 (HS)

S.C. and E.B.,¹ represented by Valerie Palma DeLuisi, Esq., appeal the bypasses of their names on the County Correctional Police Sergeant (PC2077U), Essex County eligible list. These matters have been consolidated due to common issues presented.

S.C. and E.B. respectively appeared as the 21st and 22nd ranked non-veteran eligibles on the subject eligible list, which promulgated on December 21, 2017 and expires on December 20, 2021.² A certification consisting of the names of 10 eligibles, including one veteran in the sixth position, was issued on August 14, 2020 (PL200733) with S.C. and E.B. respectively listed in the first and second positions. In disposing of the certification, Essex County (County) bypassed the appellants and appointed the third through sixth listed eligibles, effective August 22, 2020. The seventh through 10th listed eligibles were retained.

On appeal to the Civil Service Commission (Commission), the appellants note that they had been bypassed on the February 11, 2020 certification (PL200217), the certification issued prior to the PL200733 certification, but claim that Guy Cirillo, County Correctional Police Warden, advised them at the time that they would be promoted in the next round of promotions. They maintain that the County utilized improper criteria to determine promotions. Specifically, although an interview process was used as part of the criteria, all candidates were not asked the same

¹ The appellants will be referred to using their initials as their medical information will be mentioned and discussed in this decision.

² The list was extended one year to December 20, 2021.

questions; they did not all appear before the same interviewers; and there was no objective scoring method to grade the interviews. They contend that the process was “stacked and lined with implied favoritism.”

In response, the County, represented by Jill Caffrey, Assistant County Counsel, denies that Cirillo promised that the appellants would be promoted. It maintains that even if such promises were made, there still would not be grounds to reverse the appellants’ bypasses because they possessed no vested right to appointment and the County retained hiring discretion under the “Rule of Three.” The County also denies using improper criteria to determine promotions. In this regard, it states that the candidates were all interviewed by Cirillo and William Anderson, Confidential Aide, and that an interview is an entirely reasonable method to evaluate the abilities that cannot be determined by a written examination. The County submits Anderson’s certified statement, in which he states that both appellants were bypassed because they were not as knowledgeable regarding the job duties of a County Correctional Police Sergeant and seemed less prepared for their interviews than lower ranked individuals. Anderson states that S.C. was bypassed for the additional reason that he had a recent official written reprimand in 2018 for neglect of duty.

In reply, S.C. contends that his official written reprimand could not have been a legitimate, meritorious reason to be bypassed because the County promoted another individual from the same eligible list after he had recently been suspended for 30 days. If a 30-day suspension was not disqualifying, according to S.C., then a two-year-old official written reprimand certainly is not as well. S.C. also asserts that his interview process was unfair as it was pretextual and merely a “checkbox.” He states that he was only asked one question, “What about you has changed since your last interview?” to which he provided an answer related to his person, including how his perspective of life has changed since his fight with COVID-19. Thus, S.C. argues that he was not asked about the duties of a County Correctional Police Sergeant; he was only asked a personal question; and no baseline exists to determine the propriety of an answer to a personal question.

E.B. states that after he was bypassed on the February 11, 2020 certification (PL200217), he expressed his frustration at Cirillo’s unfairness to several colleagues. E.B. states that he has every reason to believe that his complaints were relayed back to Cirillo in light of what ensued during his interview. In this regard, E.B. recounts that Anderson asked him what he has learned from the COVID-19 pandemic, to which E.B. answered that he learned quite a bit especially because he had been sick with COVID-19. Anderson also asked him what his symptoms were like and how long it took him to recover. Cirillo then asked the one question E.B. knew “sealed [his] fate.” Cirillo asked him what he has learned since being bypassed on certification PL200217. E.B. responded that he “learned to keep his mouth shut because if he complains and the bosses find out, it is going to be a problem for him.”

Cirillo, according to E.B., responded, “Exactly, exactly. That’s exactly what you are supposed to do. That is exactly what I wanted to hear from you.” E.B. maintains that at that moment, he knew he was going to be bypassed again because Cirillo was retaliating against him for his complaints after being bypassed on certification PL200217. E.B. maintains that he was not asked about the job duties of a County Correctional Police Sergeant in his interview, so he could not have expressed insufficient knowledge of the same. He also maintains that his interview questions required no preparation for their response as they were not technically inquisitive or job-related. Thus, E.B. contends that the proffered reasons for his bypass are pretextual, and there was clearly an improper motive for it.

The appellants further state that the County has not been responsive to their discovery requests. Thus, they urge that if the Commission will not order their appointments, these matters should at least be referred to the Office of Administrative Law (OAL) to force discovery of the selection process. In support, the appellants submit their and their attorney’s certified statements.

In reply, the County presents Cirillo’s certified statement. Cirillo acknowledges that S.C. responded to his question regarding what he learned since his last interview by explaining his personal experience with COVID-19 but states that S.C. did not relate his response to the job. Thus, Cirillo found S.C. to be not as knowledgeable regarding the job duties and less prepared for the interview than lower ranked individuals. Although Cirillo also acknowledges that an individual was appointed to the subject title after having served a 30-day suspension in 2018, he notes that the underlying incident occurred in 2017 and was an off-duty incident as compared with S.C.’s neglect of duty charge. As to E.B., Cirillo states that E.B. responded to his question regarding what he learned since his last interview in a “very sarcastic manner, which prompted a sarcastic response from [himself] in return.” Cirillo states his belief that E.B. was not taking the interview process seriously and thus he found E.B. to be not as knowledgeable regarding the job duties and less prepared for the interview than lower ranked individuals.

In reply, the appellants argue that the County continues to suppress evidence and edit the narrative. Thus, they maintain that the County must be compelled to respond to its discovery requests.³

³ In addition, the appellants claim that the County erred by failing to properly notify this agency of their bypasses and the reasons therefor when the certification was disposed. However, the requirement that a statement of reasons be provided in support of an initial bypass is no longer required under *N.J.A.C.* 4A:4-4.8. Such reasons are only required when an eligible is initially bypassed on a list by an appointing authority and appeals that bypass to the Commission. That occurred in these matters.

CONCLUSION

N.J.S.A. 11A:4-8, *N.J.S.A.* 11A:5-7, and *N.J.A.C.* 4A:4-4.8(a)3ii allow an appointing authority to select any of the top three interested eligibles on a promotional list, provided that no veteran heads the list. Moreover, it is noted that the appellants have the burden of proof in these matters. *See N.J.A.C.* 4A:2-1.4(c).

In cases of this nature where dual motives are asserted for an employer's actions, an analysis of the competing justifications to ascertain the actual reason underlying the actions is warranted. *See Jamison v. Rockaway Township Board of Education*, 242 *N.J. Super.* 436 (App. Div. 1990). In *Jamison*, at 445, the court outlined the burden of proof necessary to establish discriminatory or retaliatory motivation in employment matters. Specifically, the initial burden of proof in such a case rests on the complainant who must establish discrimination or retaliation by a preponderance of the evidence. Once a *prima facie* showing has been made, the burden of going forward, but not the burden of persuasion, shifts to the employer to articulate a legitimate non-discriminatory or non-retaliatory reason for the decision. If the employer produces evidence to meet its burden, the complainant may still prevail if he or she shows that the proffered reasons are pretextual or that the improper reason more likely motivated the employer. Should the employee sustain this burden, he or she has established a presumption of discriminatory or retaliatory intent. The burden of proof then shifts to the employer to prove that the adverse action would have taken place regardless of the discriminatory or retaliatory motive. In a case such as this, where the adverse action is failure to promote, the employer would then have the burden of showing, by preponderating evidence, that other candidates had better qualifications than the complainant.

In these matters, S.C. and E.B. respectively appeared as the first and second listed eligibles on the certification. They argue that they were bypassed for improper reasons and suggest favoritism was at play. The County maintains that the appellants were not as knowledgeable regarding the job duties of a County Correctional Police Sergeant and were less prepared for their interviews than lower ranked individuals. Specifically, when asked by Cirillo what they had learned since last being interviewed, S.C. provided an answer that did not relate to the job and E.B. provided a sarcastic answer that suggested he was not taking the interview seriously. The County maintains that S.C. was bypassed for the additional reason that he had a recent official written reprimand for neglect of duty.

The appellants disagree and counter that the interview process was unfair. They offer a different account of the interviews and the questions asked of them. Specifically, S.C. maintains that he was only asked one question, "What about you has changed since your last interview?" E.B. recounts that Anderson asked him what he has learned from the COVID-19 pandemic; what his COVID-19 symptoms were like; and how long his recovery took. Cirillo then asked E.B. what he had learned

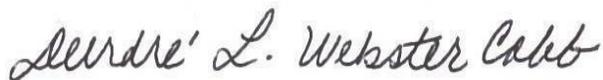
since being bypassed on certification PL200217, to which E.B. answered that he “learned to keep his mouth shut because if he complains and the bosses find out, it is going to be a problem for him.” Cirillo, according to E.B., responded, “Exactly, exactly. That’s exactly what you are supposed to do. That is exactly what I wanted to hear from you.” E.B. claims that Cirillo’s question had an underlying retaliatory motive, and E.B. does not claim that his answer or Cirillo’s response was sarcastic.

Based on the foregoing, the Commission finds that it cannot at present render a decision in these matters as there are material disputes of fact. In this regard, the record reveals a dispute as to whether the appellants were asked the same questions. In the case of E.B.’s interview, there are disputes as to whether a question was asked with a retaliatory motive and whether words were spoken sarcastically. In addition, E.B. may have been asked inappropriate medical questions. Further, the record is lacking in specifics concerning the questions asked of the appointees and how their answered comparatively showed that they were more knowledgeable about the job duties of a County Correctional Police Sergeant and more prepared for their interviews. Accordingly, under these circumstances, where it is not possible to determine on the written record whether the reasons for the bypasses of the appellants’ names were proper, these matters should be referred to the OAL for hearings.

ORDER

Therefore, it is ordered that these matters be referred to the Office of Administrative Law for hearings.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 24TH DAY OF MARCH, 2021



Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Written Record Appeals Unit
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

- c. S.C. (2021-270)
E.B. (2021-271)
Valerie Palma DeLuisi, Esq.
Robert Jackson
Courtney M. Gaccione, County Counsel
Jill Caffrey, Assistant County Counsel
Division of Agency Services
Division of Appeals and Regulatory Affairs
Records Center